Supreme Court, U. S.
FILED
AUG 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

NO. 79-256

STATE EX REL. CLETUS B. HANLEY,
PROSECUTING ATTORNEY OF KANAWHA
COUNTY, WEST VIRGINIA,

Relator,

vs.

JOHN HEY, JUDGE OF THE CIRCUIT
COURT OF KANAWHA COUNTY,
WEST VIRGINIA,

Petitioner
~~*Respondent.*~~

**PETITION FOR WRIT OF CERTIORARI
TO THE WEST VIRGINIA SUPREME
COURT OF APPEALS**

MARVIN W. MASTERS
416 Peoples Building
Charleston, Kanawha County
West Virginia 25301
Counsel for Petitioner

INDEX

	Page
Prayer	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons Relied on for Granting the Writ	4
Conclusion	8

APPENDIX

Opinion of the Supreme Court of Appeals of West Virginia	A-2
Order of the Supreme Court of Appeals of West Virginia	A-7

CITATIONS

CASES:

Gagnon v. *Scarpelli* 411 U. S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973)	4
Goldberg v. *Kelly* 397 U. S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970)	7
Holt v. *Virginia* 381 U. S. 131, 85 S. Ct. 1375, 14 L.Ed.2d 290 (1965)	7
Lindsey v. *Normet* 405 U. S. 56, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972)	7

Page

Morrissey v. *Brewer*
408 U. S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972) 4

Turner v. *Louisiana*
379 U. S. 466, 85 S. Ct. 546, 13 L.Ed.2d 424 (1965) 7

UNITED STATES CONSTITUTION:

Fifth Amendment 2, 6

Sixth Amendment 2, 6

Fourteenth Amendment 2, 6

STATUTES:

28 United States Code 1257 (3) 2

Chapter 62, Article 12, Section 10, West Virginia Code of 1931, as amended 2, 4

IN THE

Supreme Court of the United States

October Term, 1978

NO._____

STATE EX REL. CLETUS B. HANLEY, PROSECUTING ATTORNEY OF KANAWHA COUNTY, WEST VIRGINIA,

Relator,

VS.

JOHN HEY, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Petitioner, John Hey, Judge of the Circuit Court of Kanawha County, West Virginia, respondent below, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on May 22, 1979.

OPINION BELOW

The opinion below was rendered upon a Writ of Prohibition by the West Virginia Supreme Court of Appeals and the case is officially reported in 255 S.E.2d 354, a copy appended hereto.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on May 22, 1979, a copy of said judgment being appended hereto. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I. Chapter 62, Article 12, Section 10, West Virginia Code, as construed by the West Virginia Supreme Court of Appeals violates probationer's minimum procedural and substantive due process rights.

II. Whether the failure to join the probationer in an original proceeding by writ of prohibition, the ultimate effect of which was to determine whether the probation was to be revoked, violated probationer's fifth, sixth and fourteenth amendment rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Chapter 62, Article 12, Section 10, West Virginia Code of 1931, as amended, which is found in Volume 17 at Page 409 and 410, which reads as follows:

> "If at any time during the period of probation there shall be reasonable cause to believe that the probationer has violated any of the conditions of his probation, the probation officer may arrest him with or without an order or warrant, or the court which placed him on probation, or the judge thereof in vacation, may issue an order for his arrest, whereupon he shall be brought before the court, or the judge thereof in vacation, for a prompt and summary hearing. If it shall then appear to the satisfaction of the court or judge that any condition of probation has been violated, the court or judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed, and order that sentence be executed. In computing the period for which the offender is to be imprisoned, the time between his release on probation and his arrest shall not be taken to be any part of the term of his sentence. If, despite a violation of the conditions of probation, the court or judge shall be of the opinion that the interests of justice do not require that the probationer serve his sentence, the court or judge may, except when the violation was the commission of a felony, again release him on probation."

STATEMENT OF THE CASE

Probationer, Gregory Dale O'Scha, was once found guilty of breaking and entering and placed on probation by the petitioner, Honorable John Hey, Judge of the Circuit Court of Kanawha County, West Virginia. While he was on probation, he was given a notice that he had violated the terms of his probation by the commission of another felony and brought back before the Circuit Court of Kanawha County, West Virginia, on the probation violation charge prior to any determination being made anywhere as to his guilt or innocence of committing the second felony. The probationer plead guilty to violating his probation and the Circuit Court revoked his probation but did not make any findings as to whether he had, in fact, committed a second felony. Subsequently, upon a motion for reconsideration of sentence, the Circuit Court placed the probationer back on probation over the stated objection of the State of

West Virginia that the Court was prohibited therefrom by the above statute, Chapter 62, Article 12, Section 10, West Virginia Code. A writ of prohibition was applied for by the State of West Virginia ex rel. its prosecuting attorney to the Supreme Court of Appeals of West Virginia which granted the writ and ordered your petitioner to revoke the probation for the reason that the statute did not require the defendant to have been convicted of a felony—only to have committed one.

REASONS RELIED ON FOR GRANTING THE WRIT

I. CHAPTER 62, ARTICLE 12, SECTION 10, WEST VIRGINIA CODE, AS CONSTRUED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS VIOLATES PROBATIONER'S MINIMUM PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS.

In the case of *Gagnon* v. *Scarpelli*, 411 U. S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973), this Court held that minimum requirements similar to those for parolees described in *Morrissey* v. *Brewer*, 408 U. S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972), were applicable to probationers. These rights include the right to have a fact finding officer with discretion make the determinations required to a revocation of probation. In the case at bar, the probationer was sent a notice that he had violated his probation by breaking and entering which was claimed in the notice to be felonious. However, the probationer was never indicted, tried or convicted of the felony charge. The Circuit Court did not find he had committed a felony, but did find he was guilty of violating the conditions of his probation and revoked his probation. On motion for reconsideration of sentencing, the Circuit Court placed him once again on probation. At this point the State objected claiming the Court was without jurisdiction for the reason that

the probationer had committed a second felony and sought original relief from the Supreme Court of Appeals of West Virginia by writ of prohibition. Although the Circuit Court's order did not find the probationer had committed a felony and although the Circuit Court demurred and answered claiming it had not found the probationer to have committed a second felony and that he had not been found by another Court to have committed the felony, the Supreme Court of Appeals found he had committed a felony. The State Supreme Court held that since the notice had charged him with having committed a felony and that the probationer plead guilty to violating probation, the Circuit Court, regardless of its factual findings, was precluded from placing probationer once again on probation pursuant to Chapter 62, Article 12, Section 10, West Virginia Code.

The statute violates probationer's minimum rights because the probationer did not plead guilty to breaking and entering or to committing a felony, but to the charge that he was guilty of violating his probation. Therefore, the probationer was not provided with adequate notice of the proceedings against him, nor with a fact finding officer with discretion to decide the issues presented in his revocation, all of which is contrary to requirements of *Gagnon* v. *Scarpelli*, supra.

Further, the action of the West Virginia Supreme Court in this case is a denial of substantive due process. The distinction drawn by the Supreme Court between "committing" a felony and "conviction" of one and the usurpation of the Circuit Court's fact finding capacity as the trier of facts in a probationer's revocation hearing all violate substantive due process requirements. The statute requires that before the Cir-

cuit Court is precluded from placing a probationer on probation he must have committed a "felony." Felony is a word of art which implies committing a type of crime and at some point to have been found guilty of same. The Supreme Court's interpretation of "committing" a felony is too vague to advise the public of its meaning. It places the probationer in the position of being found guilty of "committing" a felony by a preponderance of the evidence regardless of whether he has ever been charged with the same or been adjudged as having committed one.

II. FAILURE TO JOIN THE PROBATIONER AS A DEFENDANT IN THE ORIGINAL PROCEEDINGS FOR WRIT OF PROBATION WAS A DENIAL OF PROBATIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The proceeding for prohibition in the Supreme Court of Appeals of West Virginia was an original proceeding before that Court in which pleadings, motions and evidence were permissible.

The Circuit Court demurred to the petition of the State requesting a writ of prohibition in the West Virginia Supreme Court for, among other reasons, that the State of West Virginia had not joined the probationer as a party and that this violated his constitutional rights. The Supreme Court held that it was true that in prohibition proceedings, any person whose rights may be affected must be made a party and given notice of the proceedings. However, the Supreme Court held that since counsel for probationer in the revocation proceedings had represented the Circuit Court in the Supreme Court, it was not necessary for him to be made a party.

This holding does not take into account the probationer's due process and equal protection rights. He

was not given an opportunity to be heard in person, to present witnesses and documentary evidence or the right to confront and cross-examine adverse witnesses, all of which are required by *Gagnon* v. *Scarpelli*, supra, in a probation revocation hearing. The proceedings in the West Virginia Supreme Court was not an appellate review of the Circuit Court's decision, but an original proceeding wherein facts were in dispute which were critical to probationer's liberty, including whether he had committed a second felony, plead guilty to same and whether the Circuit Court had found him to have committed a second felony. This was, in effect, an extension of the probation revocation hearing and probationer was denied his right to be present and defend.

Basic due process requirements of any person, whether a probationer or otherwise, dictate certain minimum requirements. Disregarding the fact that the prohibition action in any way affected a criminal defendant's rights to liberty, the failure to make him a party affected his rights. The Circuit Court was in no position to protect the accused's rights and should not be expected to so do. Some of the basic rights of probationer which were violated were (1) the right to be present; *Holt* v. *Virginia*, 381 U. S. 131, 85 S. Ct. 1375, 14 L.Ed.2d 290 (1965); (2) the right to raise issues in the proceeding; *Lindsey* v. *Normet*, 405 U. S. 56, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972); (3) the right to be heard at a meaningful time and in a meaningful manner; *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970); and (4) the right to a fair hearing; *Turner* v. *Louisiana*, 379 U. S. 466, 85 S. Ct. 546, 13 L.Ed.2d 424 (1965). The fact that probationer's counsel represented the Circuit Court in the prohibition proceeding did not give the probationer

an opportunity to answer or defend the accusations of the State of West Virginia.

CONCLUSION

For these reasons, petitioner prays that a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

MARVIN W. MASTERS
416 Peoples Building
Charleston, Kanawha County
West Virginia 25301
Counsel for Petitioner

APPENDIX

NO. 14352

[Filed May 22, 1979

George W. Singleton, Clerk of the Supreme Court of Appeals of West Virginia]

STATE EX REL. CLETUS B. HANLEY, PROSECUTING ATTORNEY

v.

JOHN HEY, JUDGE, CIRCUIT COURT OF KANAWHA COUNTY

Prohibition — Writ Granted

McGraw, Justice

1. Under the terms of W. Va. Code § 62-12-10, a circuit court exceeds its legitimate authority when it suspends the execution of sentence and releases on probation an offender who has been adjudged in a probation revocation proceeding to have committed a felony while on probation.

2. Prohibition will lie to prohibit a judge from exceeding his legitimate powers." Syl. pt. 2, *State ex rel. Winters* v. *MacQueen*, ... W. Va. ....., 239 S.E.2d 660 (1977).

McGraw, Justice:

We granted a rule to show cause in this prohibition proceeding to consider the narrow and limited question of whether a circuit court has the power to continue the probation of an individual who is adjudged in a final revocation hearing to have violated a condition of his probation by committing a felony. We answer the question in the negative and say that the respondent

trial court exceeded its legitimate powers by granting probation. We grant the writ.

In September of 1977, Gregory Dale O'Scha plead guilty to a felony charge and was placed on probation for a period of two years by the Circuit Court of Kanawha County. Subsequently, the probation authorities sought to revoke his probation. The probationer was given written notice of the charge against him in both the preliminary and final revocation proceedings, namely, that he had committed a breaking and entering or entry without breaking of a certain store house located in Kanawha County in May of 1978. Following the final revocation hearing, the trial court entered an order revoking probation based on a plea of guilty to the charge against him.

Thereafter the probationer was sentenced on his original 1977 felony conviction. Counsel for the probationer filed a timely motion for reconsideration of the sentence, and after a hearing on the motion, the trial court suspended the sentence previously imposed upon a finding that "the character of the offender and the circumstances of the case now indicate that he is not likely again to commit crime, and that the public good does not require that he be further imprisoned in the West Virginia State Penitentiary. . . ."

I.

Article 12 of Chapter 62 of the West Virginia Code contains the law of this State regulating the probation of criminal offenders. Section 1 of that article provides that "[a]ny Circuit court of this State shall have authority *as provided in this article* to place on probation any person convicted of a crime." (Emphasis added). This provision specifically authorizes circuit courts of

this State to place on probation any person convicted of a crime to the extent that such authority is provided for in other sections of article 12.

Section 2 sets forth the categories of persons who shall be initially eligible for probation upon the conviction of a crime. Section 10 is the source of a circuit court's authority to continue the period of probation where a term or condition of probation has been violated. This section reads in pertinent part as follows:

> If, despite a violation of the conditions of probation, the court or judge shall be of the opinion that the interests of justice do not require that probationer serve his sentence, the court or judge may, *except when the violation was the commission of a felony*, again release him on probation. (*emphasis supplied*).

This section authorizes a circuit court to continue the term of probation despite the violation of a condition of probation where the interests of justice do not require the probationer to serve his sentence. The Circuit Court, however, is expressly prohibited from releasing an individual on probation ". . . when the violation was the commission of a felony."

The respondent argues this exception is only applicable where a probationer is actually indicted and convicted of a felony, and does not become operative where a probationer is merely adjudged to have violated a condition of probation by the commission of a felony.

We do not accept this interpretation. The language of section 10 is clear and unambiguous. If the Legislature wanted to limit the exception to felony convictions, it could have used the words "conviction" of a

felony instead of "commission" of a felony, as it did in other sections of Article 12.

The statutory exception to a trial court's authority to again release a person on probation, despite a violation of a term of probation, is applicable here. The statute simply does not authorize continued probation on the facts in this case.

While we recognize that probation statutes have been held to be remedial in nature and subject to liberal construction, *Dyke* v. *Commonwealth*, 193 Va. 478, 69 S.E.2d 483 (1952), such construction is not permissible where, as in this case, the provision is free from ambibuity.

As we observed in our recent pronouncement in *State ex rel. Winter* v. *Scott*, ___ W. Va. ___, ___, 239 S.E.2d 660, 661 (1977), "[t]he judge's discretion in matters of probation . . . [is] proscribed by legislative fiat and . . . he is bound thereby."

Accordingly, the circuit court exceeded its legitimate power by again suspending the imposition or execution of sentence and releasing the offender on probation. "Prohibition will lie to prohibit a judge from exceeding his legitimate powers." Syl. pt. 2, *State ex rel. Winter* v. *MacQueen, supra.*

The respondent also argues that prohibition is not proper in this case because the probationer was not made a party to this proceeding. As a general rule in prohibition proceedings, any person whose rights may be affected by the issuance of a writ must be made a party and must be given notice of the proceeedings. *State ex rel. Partain* v. *Oakley*, ___ W. Va. ___, 227 S.E.2d 314 (1976); 15 M. J. *Prohibition* § 20 (1979).

The record reveals that counsel for the probationer was present during all the proceedings in this case and, in fact, he defended the actions of the respondent judge by acting as his counsel before this Court. The interests of the respondent judge and the probationer are identical as both seek to preclude issuance of the writ of prohibition on the ground that the respondent judge had the authority to release the offender on probation. The offender's interests were thus represented by his counsel. Under these special circumstances, we do not find the general rule controlling.

Writ granted.

NO. 14352

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd day of May, 1979, the following order was made and entered, to-wit:

State of West Virginia ex rel. Cletus B. Hanley,
Prosecuting Attorney of Kanawha County,
West Virginia,
Relator,

vs.

John Hey, Judge of the Circuit Court of Kanawha
County, West Virginia,
Respondent.

The Court having maturely considered the petition and exhibits, the rule awarded thereon, the separate answer and demurrer of the respondent to relator's petition, and the argument and briefs of counsel thereon, is of the opinion for reasons stated in writing and filed with the record that the relator is entitled to a writ of prohibition as prayed for in his said petition. It is therefore considered and ordered by the Court that a writ of prohibition do issue, directed to the respondent, John Hey, Judge of the Circuit Court of Kanawha County, West Virginia, restraining and prohibiting him from suspending the sentence imposed on Gregory Dale O'Scha on the 30th day of August, 1978, and placing Gregory Dale O'Scha on probation pursuant to the order of that Court entered October 24, 1978, in No. CR-77-F-214, more fully set forth and described in the petition herein; in accordance with the principles stated in the written opinion aforesaid and further according to law.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice McGraw, was concurred in by Chief Justice Caplan, Justices Neely, Harshbarger and Miller.

The service of an attested copy of this order upon the respondent aforesaid shall have the same effect as the service of a formal writ.

A True Copy

Attest: George W. Singleton, Clerk
Supreme Court of Appeals

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, To-wit:

I, Robert A. Taylor, attorney in the office of Marvin W. Masters, attorney of record for Honorable John Hey, Judge, Circuit Court of Kanawha County, West Virginia, appellant herein, depose and say that on the 15th day of August, 1979, I served a copy of the foregoing Petition For Certiorari on the State of West Virginia, ex rel. its prosecuting attorney, respondent herein by delivering a true and exact copy of same to Francis W. McCoy, Assistant Attorney General, the attorney of record for said respondent.

Robert A. Taylor

Taken, subscribed and sworn to before me this 15th day of August, 1979.

My commission expires .

Wanda L. Roush
Notary Public
Commissioned as Wanda L. Hola

Supreme Court, U.S.
FILED
OCT 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-256

JOHN HEY, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA,

Petitioner,

vs.

STATE EX REL. CLETUS B. HANLEY, PROSECUTING ATTORNEY OF KANAWHA COUNTY, WEST VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHAUNCEY H. BROWNING
Attorney General

FRANCES WILEY McCOY
Assistant Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

Counsel for Respondent

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

	Page
Prayer	1
Questions Presented	1
Statement of the Case	2
Argument	3
Conclusion	8

CITATIONS

CASES:

Argensinger v. Scarpelli, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); 7

Dobbs v. Wallace, 201 S.E.2d 914 (W.Va. 1974); 3

Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); 3, 6

Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); 7

Louk v. Haynes, 223 S.E.2d 780 (W.Va. 1976); 3, 7

Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); 7

Page

Morrissey v. Brewer,
408 U.S. 471, 479-480, 92 S. Ct. 2593, 33
L. Ed. 2d 484 (1972); 5

State ex rel. Hanley v. Hey,
255 S.E.2d 354 (W.Va. 1979); 6

State ex rel. Partain v. Oakley,
227 S.E.2d 314 (W.Va. 1976); 6

State ex rel. Winter v. MacQueen,
239 S.E.2d 660 (W.Va. 1977); 4, 5

State v. Dent,
25 W.Va. 1 (1884) *aff'd*, 129 U.S. 114, 9 S. Ct.
231, 32 L. Ed. 623 (1889); 6

Stepheney v. United States,
516 F.2d 7 (4th Cir. 1975); 7

STATUTES:
Chapter 62, Article 12, Section 2,
West Virginia Code of 1931, as amended; 4

Chapter 62, Article 12, Section 10,
West Virginia Code of 1931, as amended; 3, 7, 8

Article VI, Section 1
West Virginia Constitution, ... 6

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-256

JOHN HEY, JUDGE OF THE CIRCUIT
COURT OF KANAWHA COUNTY,
WEST VIRGINIA,

Petitioner,

vs.

STATE EX REL. CLETUS B. HANLEY,
PROSECUTING ATTORNEY OF KANAWHA
COUNTY, WEST VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

The respondent, State ex rel. Cletus B. Hanley, Prosecuting Attorney of Kanawha County, West Virginia, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of Appeals of West Virginia's judgment in this case. That judgment is reported at 255 S.E.2d 354 (1979).

QUESTIONS PRESENTED

I. Whether a probationer's due process rights are violated if his probation status is revoked upon determination of the commission of a subsequent felony.

II. Whether a probationer's interests are sufficiently represented and protected by the presence and participation of his counsel in a proceeding to review the legality of his probation status.

STATEMENT OF THE CASE

On September 19, 1977 Gregory Dale O'Scha plead guilty to a felony charge and was placed on probation for a period of two years by the Honorable John Hey, Judge of the Circuit Court of Kanawha County, West Virginia. Subsequently, O'Scha received written notice from probation authorities that sought to revoke his probation on grounds that he had violated the terms of his probation by committing another felony. O'Scha was represented by counsel, Marvin W. Masters, at the preliminary and final revocation proceedings. At the final revocation hearing, the trial court entered an order revoking probation based on a plea of guilty to the charge of violating the terms of his probation by committing a second felony. On August 30, 1978 Judge Hey ordered that the sentence imposed on petitioner on September 19, 1977, be carried out. O'Scha was then incarcerated to serve the indeterminate sentence of not less than one (1) year nor more than ten (10) years.

Probationer's counsel, Marvin W. Masters, made a timely Motion for Reconsideration of the sentence of the Kanawha County Circuit Court. Such motion was granted on October 11, 1978 by the petitioner Judge. On October 24, 1978 Judge Hey ordered Gregory Dale O'Scha released from incarceration and placed O'Scha on probation for a period of five (5) years, over objection of the respondent. It was the respondent's position that the petitioner was prohibited from doing so by the terms of

West Virginia Code, Chapter 62, Article 12, Section 10 of 1931, as amended.

The respondent presented a petition for Writ of Prohibition to the Supreme Court of Appeals of West Virginia praying the court to issue a rule restraining and prohibiting petitioner from suspending the sentence imposed on O'Scha and placing O'Scha on probation. The rule was issued and briefs were submitted by respondent and by O'Scha's counsel below, Marvin W. Masters. After oral argument was had, wherein petitioner's counsel, Marvin Masters, appeared before the Supreme Court of Appeals of West Virginia, that Court issued a Writ of Prohibition as prayed for by the respondent.

ARGUMENT

I. THE SUPREME COURT OF APPEALS OF WEST VIRGINIA FULLY CONSIDERED PETITIONER'S ARGUMENTS AND CORRECTLY DECIDED, UPON THE FACTS OF THE CASE, TO ORDER A WRIT OF PROHIBITION AS PRAYED FOR BY RESPONDENT.

The revocation of probation proceedings in the instant case were structured and conducted in compliance with all the requirements and guidelines established by this Court and the Supreme Court of Appeals of West Virginia. *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *Louk v. Haynes,* 223 S.E.2d 780 (W.Va 1976); *Dobbs v. Wallace,* 201 S.E.2d 914 (W.Va. 1974). Any person awarded probation in West Virginia may continue to enjoy that more lenient corrective process so long as the convicted person does not subsequently commit a felony. West Virginia Code 62-12-10 clearly and unambiguously delimits the discretion to be employed by any hearing officer or judge when

determining whether probation should be continued where a term of that probation has been violated. Section 10 reads in pertinent part:

> "If at any time during the period of probation there shall be reasonable cause to believe that the probationer has violated any of the conditions of his probation, the probation officer may arrest him with or without an order or warrant, or the court which placed him on probation, or the judge thereof in vacation, may issue an order for his arrest, whereupon he shall be brought before the court, or the judge thereof in vacation, for a prompt and summary hearing. * * * If, despite a violation of the conditions of probation, the court or judge shall be of the opinion that the interests of justice do not require that the probationer serve his sentence, the court or judge may, except when the violation was the commission of a felony, again release him on probation. (1939, c. 27, § 10; 1955, c. 41.) West Virginia Code 62-12-10.

If a probationer does commit a subsequent felony, the law states that the individual serve the sentence imposed by the conviction of the first felony. The final revocation hearing is dispositive of whether the probationer did commit a felony as charged.

In *State ex rel. Winter v. MacQueen,* 239 S.E.2d 660 (W.Va. 1977), the court discussed West Virginia Code, Chapter 62, Article 12, Section 2. Section 2 sets forth those instances wherein a sentencing judge may grant probation. The sentencing court in *MacQueen* placed the convicted felon on probation despite the fact that he had been adjudged guilty of a prior felony within less than five (5) years.

Section 2 unequivocally provides, in pertinent part, that:

> "All persons who have not been previously convicted of a felony within five years from the date of the felony for which they are charged, and who are found guilty of or plead guilty to any felony, the maximum penalty for which is less than life imprisonment * * * shall be eligible for probation * * *." Code 62-12-10.

The West Virginia Supreme Court of Appeals reversed the lower court, pointing out that judicial discretion in the matter of probation in such a case is proscribed by legislative fiat. As the language was clear and unambiguous, "said statute must be applied, not construed." 239 S.E.2d at 661. The statute was found to be constitutionally sound. *Id.* at 662. The court noted further, in the concurring opinion, that the Legislature has the broad right to define crimes and their punishment subject to certain constitutional limitations. *Id.* at 663. It then went on to state:

> "A study of the authorities relied upon by Chief Justice White in *Ex parte United States, Petitioner,* [242, U.S. 27, 44, 37 Ct. 72, 75, 61 L. Ed. 129 (1916)], particuliarly 2 Hale, *Pleas of the Crown* 412 (1st American ed. 1847), and 4 Blackstone, *Commentaries of The Laws of England* (1803), convinces me that courts possess no inherent power to place a defendant on probation." *Id.* at 663.

The court properly relied upon its discussion of Section 2 in *MacQueen, supra,* in considering Section 10 in light of the present facts. As is apparent on the face of Section 10, the circuit court had to remand probationer to the custody of the State after he admitted with counsel that he had subsequently committed a felony. This Court has implicitly recognized that the voluntary admission of the commission of a felony may be grounds for withdrawal of probation. *Gagnon v. Scarpelli, supra* at 787.

A revocation decision, as stated in *Morrissey v. Brewer,*

408 U.S. 471, 479-480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), has two analytically distinct components: whether the alleged probation violation occurred and if so, whether such infraction undermines the intended rehabilitative purpose of the probation. Pursuant to its almost plenary powers under Article VI, Section 1 of the West Virginia Constitution; see *State v. Dent*, 25 W.Va. 1 (1884), *aff'd*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889), the West Virginia Legislature has determined that the commission of a second felony would negate any intended beneficial effects of probation and has mandated that probation be uniformly withdrawn in such instances. This legislative decision is constitutional.

The probationer O'Scha admitted that he was guilty of violating the terms of his probation by committing a felony. In the face of this voluntary admission of guilt, the Supreme Court of Appeals of West Virginia correctly decided that O'Scha's probation revocation was required by law.

II. THE DECISION OF *STATE EX REL. HANLEY v. HEY*, 255 S.E.2d 354 (W.Va. 1979), TURNS UPON ITS OWN FACTS AND AFFECTS FEW OTHERS, IF ANY, BESIDES THE LITIGANTS.

A general rule in prohibition proceedings in West Virginia is that any person whose rights may be affected by the issuance of a writ must be made a party and must be given notice of the proceedings. *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W.Va. 1976). The court recognized this rule in its opinion in the instant case. 255 S.E.2d at 356. The court also recognized that the probationer O'Scha and the petitioner had identical interests in the proceedings before the State Supreme Court. Furthermore, Marvin W. Masters, O'Scha's counsel in the

probation revocation hearings, answered, briefed, and argued the case below on behalf of the petitioner. The court found that O'Scha had actual notice of the proceedings and that his interests were adequately represented by his counsel. The court held that, under these unique circumstances, the general rule was not controlling and issued the Writ of Prohibition.

The presence of counsel has repeatedly been the crucial element in decisions involving the equal protection and due process afforded criminal defendants. See *Argensinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); *Stepheney v. United States*, 516 F.2d 7 (4th Cir. 1975); *Louk v. Haynes, supra*. The actual presence of an unnamed party's counsel cannot be seen as a denial of due process or equal protection if the unnamed and named parties interests are identical in fact and in law. Due to the limited nature of the decision below and the special factual circumstances, the West Virginia Supreme Court of Appeals properly granted an exception to the general rule.

Probationer O'Scha and his counsel, Marvin W. Masters, appeared at the revocation hearing. O'Scha, upon advice of counsel, plead guilty to the charge of violating the terms of his probation. Petitioner is engaging in a battle of semantics to argue that he did not plead guilty to the charge of committing a felony when he had written notice of the charge and such charge was the basis of the revocation proceedings. Because there were no facts in dispute, the State Supreme Court was asked to decide solely a question of law—the meaning of the clear and unambiguous words of West Virginia Code, Chapter 62, Article 12, Section 10. The court properly saw no merit

in petitioner's argument that a probationer be subjected to a criminal trial and the possibility of further punishment upon conviction in order to assure due process in the revocation of probation.

In the presence of counsel, the probationer knowingly and willingly admitted he violated the terms of his probation by the commission of a felony. The petitioner acted in contravention of West Virginia Code 62-12-10 by placing O'Scha on probation. The respondent petitioned the State Supreme Court to order petitioner to comply with State law. The Supreme Court of Appeals of West Virginia so ordered.

CONCLUSION

For the foregoing reasons, respondent submits that the Petition for Writ of Certiorari should be denied and that the order of the Supreme Court of Appeals of the State of West Virginia should thereby be affirmed.

Respectfully submitted,

STATE EX REL. CLETUS B. HANLEY,
Prosecuting Attorney of Kanawha
County, West Virginia,
Respondent

By Counsel

CHAUNCEY H. BROWNING
Attorney General

FRANCES WILEY McCOY
Assistant Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Chauncey H. Browning, one of counsel for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28th day of September, 1979, I served three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on the petitioner by hand delivering the same to counsel of record for the petitioner, Marvin W. Masters, 416 Peoples Building, Charleston, West Virginia. I further certify that all parties required to be served have been served.

Chauncey H. Browning

CHAUNCEY H. BROWNING